Supreme Court of the United States

OCTOBER TERM, 1945

NO. 5.

STATE OF NEW YORK AND SARATOGA SPRINGS COMMISSION AND SARATOGA SPRINGS AUTHORITY, Petitioners,

v.

UNITED STATES OF AMERICA.

BRIEF ON REARGUMENT, FOR THE COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE.

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The Attorney General for the Commonwealth of Pennsylvania has joined in the "Brief for the States as *Amici Curiae*".

This additional brief is prompted by the emphasis placed by counsel upon such decisions as *South Carolina v. United States*, 199 U. S. 437 (1905), and *Ohio v. Helvering*, 292 U. S. 360 (1934).

The Pennsylvania Liquor Control Board was created by Act of November 29, 1933 (Pamphlet Laws, page 36, Title 47, Purdon's Penna. Stats., sec. 744). The purpose of the Act was to provide a system of control for the sale of intoxicating liquors, which was made

necessary by the impending repeal of the Eighteenth Amendment to the Federal Constituton.

The Liquor Control Board has been paying the excise tax on liquor sold. This court has raised an additional question as to the power of the federal government to tax the income of a state from an activity.

The title of this Act was

> "An Act To regulate and restrain the sale, importation, and use of certain alcoholic beverages; conferring powers and imposing duties upon the Pennsylvania Liquor Control Board, the Department of Public Instruction, other officers of the State government, courts, and district attorneys; authorizing the establishment and operation of State stores for the sale of such beverages not for consumption on the premises; forbidding importation of bringing of such beverages into the State except as herein provided; prohibiting certain sales or practices in, connection with, and transactions in such beverages by licensees and others; making disposition of the receipts from State stores and of license fees; and imposing penalties."

The purpose of the Act was declared in Section 3 as follows:

> "This act shall be deemed an exercise of the police power of the Commonwealth for the protection of the public welare, health, peace and morals of the people of the Commonwealth, and to prohibit forever the open saloon; * * *"

Section 801, prescribing the effective date of the Act, enacted "* * * nothing herein contained shall authorize the sale of any liquor prior to the day when

the Twenty-first Amendment to the Constitution of the United States is ratified by conventions in at least three-fourths of the several states, * * *

The effect of the Act was to require that all liquor sold in Pennsylvania must pass through the hands of the Pennsylvania Liquor Control Board. Regular tests in the laboratory of the Board protect the public from liquor containing poisonous or other injurious ingredients. Liquor could be sold only in pursuance of a license for specified premises operated by a hotel, restaurant or club. (Sec. 401) Saloons were abolished. Each of these provisions was clearly within the scope of police power.

Prior to the Act of November 29, 1933, P. L. 36, the Commonwealth of Pennsylvania had never enacted any legislation providing for the sale by the State of intoxicating liquor. Amendment XXI, repealing the Prohibition Amendment, was proposed by Congress on February 20, 1933 and was declared ratified on December 15, 1933. The Commonwealth was compelled to pick up the problem of liquor control where the Federal Government left off. It was decided not to go back to the old ~~prohibition~~ liquor law which was in force in Pennsylvania prior to the Eighteenth Amendment. Conditions had changed. The Commonwealth was compelled to deal with a new situation created by Federal prohibition in which powerful organizations engaged in illegal sale of liquor were operating through the country. The Commonwealth endeavored to solve this problem by a system of control which outlawed all sales of liquor which did not pass through the hands of the Liquor Control Board.

The purpose of the Pennsylvania Liquor Control Law was not to obtain revenue by making a profit on the sale of liquor. It did not seek to interfere with any revenue which the Federal Government was collecting, for the reason that the Federal Prohibition Law had prohibited the sale of liquor and virtually terminated such revenue.

The purpose of the Liquor Control Law, we repeat, was not to obtain revenue, but was enacted by the Commonwealth as the most effective measure of solving a problem which devolved upon it when Federal control was abandoned.

The Liquor Control Law was an innovation in Pennsylvania, but public approval is evidenced by the continuance of the law in force.

The Pennsylvania Liquor Control Board is an agency clearly undertaken to "promote the public health, safety and welfare, and not for the purpose of making money." (Brief for the States, pp. 4, 66, 71).

The Pennsylvania Liquor Control Board is therefore, performing a paramount "public service". It is not merely engaged in selling liquors as appears to be the view taken of the South Carolina and Ohio Agencies in the brief for the State of New York (p. 44).

These considerations were relied upon in the opinions in such cases as *South Carolina v. United States*, 199 U. S. 437 and *Ohio v. Helvering*, 292 U. S. 360;

(1) Any allowance of immunity to a state agency is at the expense of the sovereign power of the nation to tax.

It is argued that if the states should concur in expanding their activities into new fields formerly occupied by private business, the power of the national government to raise revenue would be largely crippled.

The forty years which have elapsed since the ruling in the *South Carolina case* have not confirmed this apprehension. On the other hand the Federal government has engaged in many new activities and created new agencies which were unheard of when the Constitution was adopted and did not exist even at the time of the South Carolina decision. Loans amounting to billions of dollars have been made by such agencies as the Reconstruction Finance Corporation, Home Owners' Loan Corporation and the Federal Loan Bank. Such loans are free from state taxation and an enormous amount of state tax has been displaced thereby. Postal savings and government loans have withdrawn vast sums from checking and savings deposits in private banks which were taxable by the states and have absorbed other sums which would have otherwise found investment in securities taxable by the state.

Social Security and War Risk Insurance have accumulated large amounts of money which might otherwise have been invested in policies of private insurance companies, the income and investments of which would be taxed by the states. Federal Employment service, Parcel Post and other activities absorb business taxable by a state.

In contrast with the amount of state taxes which have been displaced by the tremendous growth of Federal activities, the increase in immunities of state

agencies from Federal taxation seems almost inconsiderable.

The constitution apparently affords no protection to the states against encroachments by such truly gigantic agencies of the Federal government. Since the adoption of the Federal constitution, economic changes have wrought a tremendous expansion of interstate commerce. When the constitution was adopted, business was local. Now it is largely national. Business activities which were formerly intra-state and local, have become interstate and nationwide. The great human wants, such as food, clothing, fuel, amusements, building materials, transportation, which were once furnished from local sources, are now supplied through the channels of interstate commerce. The result of this transition has been to exempt from state taxation much business which was formerly taxable by the states. Although a business becomes interstate, it is still dependant upon the police powers of the states for protection. This the federal government does not afford.

At the beginning of this nation taxes were principally levied upon land. This source of taxation for the states was protected by the provision that direct taxes by the Federal Government must be apportioned according to population and that was rarely done. Taxation of real and personal property by the national government is still so restricted, but income from real and personal property has increased prodigiously, and Federal taxes have been increased thereby.

(2) The people of all the states are represented in Congress and through that representation they may exercise control over the taxing power of the United States.

This control, we submit, is theoretical rather than actual. Are the citizens of the United States able to prevent through their representatives in Congress the passage of a Federal law taxing so-called "proprietary" enterprises of a state?

In the first place such a Federal law would affect the various states unequally. Citizens of states in which there were few large municipalities or centers of population would seldom enjoy the benefits of such proprietary agencies, and would have no interest in voting against such a measure. The people of a state which did not own any oil wells or mineral springs would not be solicitous in safeguarding the income of a state which did have the same. Some states enjoy little or no income and depend entirely upon taxation for revenue.

Even if Congress proposed a general excise tax which would affect all states equally, would the people be able to defeat it through their representatives in Congress? To do so, they would have to select candidates who would stand for such agencies only, and ignore today such vital issues as the continuance of the Selective Service Law, compulsory military training, a broader Social Security Law, full federal employment, and many other issues which absorb the interest of the people of this nation tody.

Many millions of voters favor the maintenance of high federal taxes in order to make possible such benefits as Social Security, full employment benefits, old age pensions, unemployment compensation and general relief. Other millions do not pay or do not knowingly pay any income or other federal taxes.

In this interplay of issues, how would a citizen vote so as to prevent the taxation of the mineral springs of

New York or the Liquor Control Board of Pennsylvania? His representative in Congress may be depended upon to resist in some degree federal taxation infringing upon income of a state. Participation in the government at Washington, however, tends to make the official nationally minded and interested in increasing the revenues of the Federal government.

(3) The distinction between public and private or governmental and proprietary functions.

This distinction was originally contrived by the courts to avoid exemption from liability for negligence of public employees. It is, we submit, unsound in principle and results in many inconsistencies. The authorities hold that a state or municipality may levy taxes and exercise the power of eminent domain for purpose of constructing a water supply system or an artificial gas plant, etc. Both of these powers are restricted to public purposes.

Respectfully submitted,

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